



0000035288

**ORIGINAL****BEFORE THE ARIZONA CORPORATION CC****RECEIVED**

305m

**COMMISSIONERS**

2005 NOV 22 A 9:09

JEFF HATCH-MILLER, Chairman  
WILLIAM A. MUNDELL  
MARC SPITZER  
MIKE GLEASON  
KRISTIN K. MAYES

AZ CORP COMMISSION  
DOCUMENT CONTROL

IN THE MATTER OF THE APPLICATION OF  
ARIZONA WATER COMPANY FOR AN  
EXTENSION OF THE SERVICE AREA  
UNDER ITS EXISTING CERTIFICATE OF  
CONVENIENCE AND NECESSITY TO  
PROVIDE WATER UTILITY SERVICES

DOCKET NO. W-01445A-03-0559

**STAFF'S LEGAL MEMORANDUM  
PURSUANT TO THE SEPTEMBER 28, 2005  
PROCEDURAL ORDER**

**Introduction**

The September 28, 2005 Procedural Order in the above-captioned matter directed Commission Staff to file a brief on whether Arizona Water Company ("AWC") has a valid Certificate of Convenience and Necessity ("CC&N") extension for a certain area in Casa Grande, Pinal County, Arizona, as described in Decision No. 66893. The underlying issue raised is whether the Commission's grant of AWC's CC&N in Decision No. 66893 is null and void due to AWC's failure to timely meet two of the Decision's conditions requiring AWC to (1) file a copy of the Developers' Assured Water Supply for each development in the extension area, and (2) a main extension agreement associated with the extension area.

The short answer is that AWC continues to hold a valid CC&N for the extension area. The Decision's language that the Decision is deemed null and void in the event AWC fails to meet the conditions does not automatically divest AWC's CC&N under the circumstances of this case. AWC should be provided a notice and an opportunity to be heard on its request for additional time for compliance.

1 Decision No. 66893 orders:

2  
3 IT IS THEREFORE ORDERED that the application of Arizona Water Company  
4 for an extension of its Certificate of Convenience and Necessity to include the  
area described in Exhibit A, attached hereto and incorporated herein by reference,  
is hereby granted subject to compliance with the following ordering paragraphs.

5 IT IS FURTHER ORDERED that Arizona Water Company shall charge the  
6 customers in the area more fully described in Exhibit A its existing Casa Grande  
rates and charges until further ordered by the Commission.

7 IT IS FURTHER ORDERED that Arizona Water Company shall file a copy of the  
8 Developers' Assured Water Supply for each respective development with the  
Commission within 365 days of this Decision.

9 IT IS FURTHER ORDERED that Arizona Water Company shall file a main  
10 extension agreement associated with the extension area more fully described in  
Exhibit A with the Commission within 365 days of this Decision.

11 IT IS FURTHER ORDERED that in the event Arizona Water Company fails to  
12 meet the above conditions within the time specified, this Decision is deemed null  
and void without further Order of the Arizona Corporation Commission.

13 IT IS FURTHER ORDERED that this Decision shall become effective  
14 immediately.

15 Decision No. 66893 @ 6-7, emphasis added.

16 AWC did not comply with the two relevant conditions within 365 days of the entry of the  
17 Decision. However, prior to the expiration of the 365 day time period, AWC filed a request for  
18 additional time for compliance based upon the fact that development in the area would be delayed for  
19 a year. A few days later, Robson Communities Inc. ("Robson") docketed a letter protest on behalf of  
20 Cornman Tweedy 560, LLC, ("Cornman") the owner of 1200 acres within the CC&N extension area  
21 that is to be developed as part of the EJ Ranch Master Planned Community. Robson asserted that  
22 AWC's failure to timely comply with Decision No. 66893 rendered the Decision granting AWC a  
23 CC&N for the area automatically null and void. Thereafter, Picacho Water Company filed an  
24 application for a CC&N that included the area granted to AWC in Decision No. 66893. After review  
25 of the parties' and Staff's various positions on these matters, the Administrative Law Judge issued a  
26 recommended order that granted AWC's request for additional time to comply with the conditions,  
27 and also found that Robson and Cornman had no standing to object to AWC request for additional  
28 time to comply. The Commission discussed the recommended order at its May 24, 2005 Open

1 Meeting, but no vote was taken. The parties were unable to resolve their disputes and a procedural  
2 conference was held on September 23, 2005. A subsequent procedural order directed Staff to file  
3 this brief on the issue of whether AWC continues to hold a CC&N for the extension area.<sup>1</sup>

#### 4 Discussion

5 The first issue is whether a CC&N decision with conditions subsequent grants a CC&N to the  
6 holder of the certificate. In *City of Tucson v. Arizona Corporation Commission*, the Arizona Court of  
7 Appeals holds that the Commission may order compliance with ARS § 40-282(B) (the CC&N  
8 statute), as a condition subsequent to its order granting a certificate. 1 Ariz. App. 110, 112 (1965).  
9 *City of Tucson* deals with whether a CC&N could issue before the applicant complied with § 40-  
10 282(B) requirement that “every applicant” submit evidence that it has received a franchise. *Id.* at 111.  
11 In holding that the Commission’s original order is a final order granting the CC&N, the court finds  
12 the provisions of § 40-282(B) may be ordered as a condition subsequent. *Id.* at 112. This is similar to  
13 the present situation. Decision No. 66893 granted AWC a CC&N, subject to certain subsequent  
14 conditions. The unmet conditions in *City of Tucson* required the securing of a franchise, which is  
15 analogous to Decision No. 66893’s conditions for submitting copies of the developer’s assured water  
16 supply and a main extension agreement. Thus, Decision No. 66893 granted AWC a CC&N for the  
17 extension area, even though Decision No. 66893 required AWC’s compliance with certain conditions  
18 subsequent.

19 The next issue presented is whether the Decision’s null and void language automatically  
20 divested AWC of its CC&N when AWC did not comply with the two conditions. Under the facts of  
21 this case, the null and void language did not automatically divest AWC of its CC&N. AWC has an  
22 interest in its CC&N protected by due process in this instance. AWC is entitled to notice and an  
23 opportunity to be heard on its failure to timely comply with the conditions subsequent before the  
24 CC&N can be revoked. *Application of Trico Elec. Co-op., Inc.*, 92 Ariz. 373, 381 (1962) (“Quite  
25 aside from statutory requirements the rescission or revocation of all or a portion of a certificate of  
26  
27

---

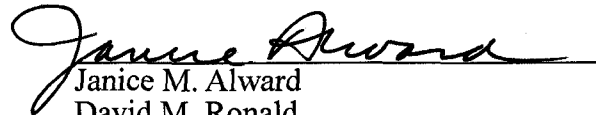
28 <sup>1</sup> On November 21, 2005, a procedural conference was held concerning these matters and the Hearing Officer requested  
that this memorandum originally filed in Docket No. W-03528A-05-0281, be filed in this Docket as well.

1 public convenience and necessity requires strict compliance with the procedural prerequisites of  
2 notice and hearing)."

3 **Conclusion**

4 In light of the above court opinions and under the circumstances of this case, it is appropriate  
5 to provide AWC an opportunity to be heard on its request for additional time for compliance prior to  
6 any action that may be taken by the Commission. In general, unless there is an overriding public  
7 interest to the contrary at stake, where there is failure to meet the conditions subsequent in a decision  
8 granting a CC&N, due process requires notice and an opportunity to be heard prior to any  
9 Commission action taken for failure to meet the conditions. That is the situation herein, and AWC  
10 should have an opportunity to be heard on its failure to comply with the two relevant conditions.

11 RESPECTFULLY SUBMITTED this 22<sup>nd</sup> day of November, 2005.  
12

13  
14   
15 Janice M. Alward  
16 David M. Ronald  
17 Attorneys, Legal Division  
18 Arizona Corporation Commission  
19 1200 West Washington Street  
20 Phoenix, Arizona 85007  
21 (602) 542-3402  
22  
23

24 Original and thirteen (13) copies  
25 of the foregoing were filed this  
26 22<sup>nd</sup> day of November, 2005 with:

26 Docket Control  
27 Arizona Corporation Commission  
28 1200 West Washington Street  
Phoenix, Arizona 85007

1 Copy of the foregoing mailed this  
2 ~~22<sup>nd</sup>~~ day of November, 2005 to:

3 Robert W. Geake  
4 ARIZONA WATER COMPANY  
5 P. O. Box 29006  
6 Phoenix, AZ 85038

7 Steven A. Hirsch  
8 BRYAN CAVE LLP  
9 Two North Central Avenue, Suite 2200  
10 Phoenix, AZ 85004-4406

11 Peter M. Gerstman  
12 ROBSON COMMUNITIES, INC.  
13 9532 East Riggs Road  
14 Sun Lakes, AZ 85248-7411

15 Jim Poulos  
16 PICACHO PEAK WATER CO.  
17 9532 East Riggs Road  
18 Sun Lakes, AZ 85248

19 Jeffrey W. Crockett  
20 SNELL & WILMER  
21 One Arizona Center  
22 Phoenix, AZ 85004

23 Christopher Kempley, Chief Counsel  
24 Legal Division  
25 ARIZONA CORPORATION COMMISSION  
26 1200 West Washington Street  
27 Phoenix, AZ 85007

28 Ernest G. Johnson, Director  
ARIZONA CORPORATION COMMISSION  
1200 West Washington Street  
Phoenix, AZ 85007

21  
22   
23  
24  
25  
26  
27  
28